85-1990 (1)

Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

STANLEY STERNER,
Appellant,

v.

DAVID J. ANDRE, ET AL.,
Appellees.

On Appeal from the Supreme Court

for the State of Virginia

JURISDICTIONAL STATEMENT

STANLEY STERNER
Pro Se Appellant

2544 Wilson Blvd.
Apt. No. 104
Winchester Va. 22601
(703) 667-6246

59pp

QUESTIONS PRESENTED

The ultimate question presented is whether Rule 5:9(b), of the Rules of the Supreme Court of Virginia, violates the pro se appellant's right to petition the court, the right to due process of law, and the right to equal protection of the law, in that this Rule, which calls for a notice of filing of transcript, as applied to the appellant is repugnant to the Constitution and laws of the United States.

This ultimate question involves, among others, the following subsidiary questions:

1. Does Virginia State Supreme Court Rule 5:9(b), as applied, and/or on its face violate appellant's:

a. First Amendment right to petition, litigate, and access the court, made applicable to the states by the Fourteenth Amendment.

b. Fourteenth Amendment right to due process of the law.

c. Fourteenth Amendment right to equal protection of the law.

The threshold question presented is whether this Court should summarily reverse the decision below and remand the case to the Virginia State Supreme Court with directions to develop a factual record adequate to serve as the basis for constitutional adjudication.

LIST OF PARTIES

All of the parties appearing in the Supreme Court of the State of Virginia are listed in the caption. Specifically: David J. Andre, D.P. Rabun, Oscar J. Andre and Russell A. Fowler, practicing law under the firm name of Larrick, White, Andre & Rabun (now Andre Rabun & Fowler), 29 North Braddock St., Winchester Va. 22601, (703) 667-6400.

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OPINIONS BELOW

The March 28, 1986 order of the Supreme Court of Virginia, staying execution of judgment (App. A, infra, 43) is not reported. The March 7, 1986 order of the Supreme Court of Virginia, denying petition for rehearing (App. A, infra, 45) is not reported. The February 13, 1986 order of the Supreme Court of Virginia, dismissing petition for appeal (App. A, infra, 46) is not reported.

JURISDICTION

This is an appeal from a final judgment of the Supreme Court of the State of Virginia holding that appellant's petition for appeal was not perfected pursuant to Rule 5:9(b). In his petition for rehearing to the state court, appellant drew into question the validity of the application of the state court rule on the ground it being federally unconstitutional. The date of the entry of the judgment sought to be reviewed is February 13, 1986. (App. A, infra, 46). On March 7, 1986 the order denying petition for rehearing was entered. (App. A, infra, 45). The notice of appeal was filed on June 4, 1986, in the Supreme Court of the State of Virginia. The Court has jurisdiction over this appeal under U.S.C. Const.Amend. 1. McDonald v. Smith, 105 S.Ct. 2787 (1985); Wayte v. U.S., 105 S.Ct. 1524 (1985);

Laker Airways Ltd. v. Pan American World Airways, 604 F.Supp. 280 (1984), 28 U.S.C. sec. 2106. Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615 (1984); Hathorn v. Lovorn, 102 S.Ct. 2421 (1982); Youakim v. Miller, 96 S.Ct. 1399 (1976); Vachon v. New Hampshire, 94 S.Ct. 664 (1974); Baggett v. Bullitt, 84 S.Ct. 1316 (1964); Glidden Co. v. Zdanok, 82 S.Ct. 1459 (1962); U.S. v. Fruehauf, 81 S.Ct. 547 (1961); Musser v. State of Utah, 68 S.Ct. 397 (1948). 28 U.S.C. sec. 1257(2). McCorvey v. State Ins. Fund, 535 F.Supp 5 (1981); Ohralik v. Ohio State Bar Ass'n, 98 S.Ct. 1925 (1978); Ohralik v. Ohio State Bar Ass'n, 98 S.Ct. 1912 (1978); In RE Primus, 98 S.Ct. 1893 (1978); Bates v. State Bar of Arizona, 97 S.Ct. 2691 (1977). 28 U.S.C. 2103. Calder v. Jones, 104 S.Ct. 1482 (1984); Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615 (1984); Richmond Newspapers, Inc. v. Virginia, 100 S.Ct.

2814 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution states, inter alia, that:

"Congress shall make no law * * * prohibiting * * * or abridging the * * * right of the people * * * to petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the Constitution states, inter alia, that:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

3. The pertinent portion of the challenged State statute, Va. Supreme Court Rules, rule 5:9(b), reads as follows:

"The transcript of any hearing also becomes a part of the record when, within sixty days after entry of the final judgment, the transcript is filed in the office of the clerk and a notice signed by counsel for the appellant is filed in the office of the clerk identifying the tran-

script and reciting its delivery to the clerk. There shall be appended to the notice either a certificate of counsel for the appellant that a copy of the notice has been mailed to opposing counsel or an acceptance of service of such notice by opposing counsel."

4. a. Rule 5:9(a) of the Va. Supreme Court Rules, provides:

"The transcript of any hearing becomes a part of the record when the judge of the trial court so directs in the final judgment or by order entered before or within twenty-one days after entry of final judgment, whether or not the transcript has been prepared at the time of the order, and when the transcript is filed in the office of the clerk within sixty days after entry of final judgment. But no such order shall be entered at a time when the transcript has not been prepared if any party objects to its entry."

b. Rule 5:6(a), of the Va. Supreme Court Rules, provides:

"No appeal shall be allowed in a case in which an appeal lies to the Suprreme Court unless, within thirty days after entry of final judgment or other appealable order or decree, counsel files with the clerk a notice of appeal. The notice of appeal shall contain a statement whether or not any transcript or statement of facts, testimony or other incidents of the case is to be thereafter filed."

c. Rule 5:7, of the Va. Supreme

Court Rules, provides:

"The filing of the notice of appeal (Rule 5:6), the transcript or written statement (Rule 5:9), and the petition for appeal (5:24) within the time prescribed is mandatory. The time is not extended by the filing in the trial court of a motion for new trial, a petition for rehearing, or like pleading unless the final judgment is modified, vacated or suspended pursuant to Rule 1:1, in which case the time for filing shall be computed from the date of the final judgment entered following such modification, vacation or suspension."

d. Rule 1:3, of the Va. Supreme Court Rules, in pertinent part states:

"* * * When a reporter takes down any proceeding in a court, any person interested shall be entitled to obtain a transcript of the proceedings or any part thereof upon terms and conditions to be fixed in each case by the judge. * * *"

e. The pertinent portion of Va.Code sec. 8.01-420.3, reads as follows:

"Upon the request of any counsel of record, or of any party not represented by counsel, and upon payment of the reasonable cost thereof, the court reporter covering any proceeding shall provide the requesting party with a copy of the transcript of such proceeding or any requested portion thereof. * * *"

CONCISE STATEMENT OF THE CASE

On February 13, 1986 the Va. Supreme Court held that appellant pro se's petition for appeal was not perfected pursuant to Rule 5:9(b).(App. A, infra, 3). On February 25, 1986 appellant filed petition for rehearing (App. C, infra) and raised the following federal questions which it is asking this Court to review:

1. The Va. Supreme Court arbitrarily and discriminatorily abused its power in the application of Rule 5:9(b) in that they violated appellant's rights to equal justice, equal protection, and due process of law, as guaranteed by the Fourteenth Amendment:

a. The Va. Supreme Court in the underlying case allowed the appellees to have their petition for appeal adjudicated on its merits despite the

fact that the appellees had also disobeyed rule 5:9 with respect to filing a notice of filing a transcript.

b. The Va. Supreme Court also reviewed the following cases on their merit despite the fact that rule 5:9 was disobeyed in that notices of filing a transcript were not filed: Towler v. Com., 221 S.E.2d 119 (1976), and Roe v. Roe, 324 S.E.2d 691 (1985).

c. The Va. Supreme Court refused to review appellant's petition for appeal on its merit due to appellant's pro se status.

The Va. Supreme Court was tight-lipped about the federal questions raised in the appellant's petition for rehearing in their order to deny entered on March 7, 1986. (App. A, infra, 2).

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

The following is a statement of reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution:

Does Va. State Supreme Court Rule 5:9(b), as applied, and/or on its face violate appellant pro se's First Amendment right to petition, litigate, and access the court, made applicable to the states by the Fourteenth Amendment. A challenge to the constitutionality of a state court rule was deemed sufficient to support jurisdiction on appeal. West's Federal Forms sec. 121, page 232. Ohralik v.Ohio State Bar Ass'n, 98 S.Ct. 1912 (1978), and In re Primus, 98 S.Ct. 1893 (1978) concerned the unconstitutional application of State court rules in which the Court noted prob-

able jurisdiction on appeal. In the instant case the appellant in his petition for rehearing (App. C, infra) claimed that Va. State Supreme Court Rule 5:9(b) was unconstitutionally applied and was done so in a manner which was arbitrary and discriminatory. In Sullivan v. Little Hunting Park, Inc., 90 S.Ct. 400 (1969) the Court held that Rule 5:1, sec. 3(f) (predecessor to 5:9) is more properly deemed discretionary than jurisdictional, and does not bar review by the U.S. Supreme Court. The Court also held that because this notice requirement was so inconsistently applied by the Supreme Court of Virginia as to grant power to the U.S. Supreme Court to entertain federal claim. In the instant case the appellant has demonstrated that the Supreme Court of Virginia has inconsistently applied the notice requirement contained in Rule 5:9. (App. C, infra).

Example, the Va. Supreme Court in the underlying case allowed the appellees to have their petition for appeal adjudicated on its merits despite the fact that the appellees had also disobeyed rule 5:9 with respect to filing a notice of filing a transcript. The Va. Supreme Court also reviewed the following cases on their merit despite the fact that rule 5:9 was disobeyed in that notices of filing a transcript were not filed: Towler v. Com., 221 S.E.2d 119 (1976), and Roe v. Roe, 324 S.E.2d 691 (1985). In Sullivan v. Little Hunting Park,Inc., 90 S.Ct. 400 (1969) the Court provides that the controlling principle for the notice requirement is as follows:

"The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If * * * opposing counsel be afforded reasonable opportunity to examine the transcript, and to make objections thereto, if any he has * * * the object of reasonable

notice will have been attained."
The Court also observed that opposing counsel, so far as the record shows did not at the time complain that he was not given that "reasonable opportunity" he needed to examine and correct the transcripts. The instant case is strikingly similar in that opposing counsel, so far as the record shows also did not complain about any lack of notice. (App. C, infra). In addition opposing counsel need not wait for notice, in that Va. Supreme Court Rule 1:3 and Va. Code sec. 8.01-420.3 allow any person or party to request at any time a copy of the transcript or any portion thereof upon payment of the reasonable cost thereof. In N.A.A.C.P. v. Alabama, 84 S.Ct. 1302 (1964) the Court held that review will not be precluded, where noncompliance with state procedural rules was complied with both in substance and

form in every real sense. In Stokely v. Owens, 52 S.E.2d 164 (1949) the Va. Supreme Court of Appeals held that notice requirement contained in Rule 21 (predecessor to Rule 5:1, sec. 3(f), superseded by Rule 5:9) may be waived, particularly where its purpose has been otherwise accomplished especially where opposing counsel was given opportunity to examine and correct the record. In the instant case not only did opposing counsel examine the transcript, they subsequently filed a brief in opposition to petition for appeal, and cited various sections of the transcript numerous times. Yet the Va. Supreme Court chose to summarily dismiss appellant's petition for appeal pursuant to Rule 5:9(b) (App. A, infra, 46) despite the fact that the purpose of the notice requirement had been accomplished. In McDonald v. Smith 105 S.Ct. 2787 (1985)

the Court held that the First Amendment right to petition includes the right to file a complaint in court. The Court also held that the right to petition is cut from the same cloth as the other guarantees of the First Amendment, and is an assurance of a particular freedom of expression. In Hudson v. Palmer, 104 S.Ct. 3194 (1984) the Court held that the First Amendment constitutional right to petition the Government for redress of grievances, includes the right of access to the courts. In the instant case the court clearly violated the appellant's constitutional right to file a complaint in their court, by ordering the extreme sanction of dismissal of his petition for appeal. In Singleton v. Wulff, 96 S.Ct. 2868 (1976) the Court held that issues not raised in the court below may be resolved by federal court where the proper resolution is beyond any doubt or where in-

justice might otherwise result. In Youakim v. Miller, 96 S.Ct. 1399 (1976) the Court held that the rule that questions not raised in the court below would not be reviewed in this Court is not inflexible and that in exceptional cases they would review questions not pressed or passed upon below. In Hathorn v. Lovorn, 102 S.Ct. 2421 (1982) the Court held that a state procedural rule which is not strictly or regularly followed is not an adequate state ground for precluding review by this Court of federal questions. In Hynes v. Mayor and Council of Borough of Oradell, 96 S.Ct. 1755 (1976) the Court held that laws dealing with First Amendment rights are held to stricter standards of permissible vagueness and all are entitled to know what the state commands or forbids. Now for the first time the appellant challenges the constitutionality of Va. Court Rule

5:9(b) in that this rule is void for vagueness and infringes on appellant's First Amendment right to petition the court. In Glidden Co. v. Zdanok, 82 S.Ct. 1459 (1962) the Court held that a challenge raised for the first time in this Court will be reviewed when based on non-frivolous constitutional grounds. In Vachon v. New Hampshire, 94 S.Ct. 664 (1974) the Court held that questions not raised in the court below may be noticed for plain error. In the instant case Rule 5:9(b) fails to state whether the rule is mandatory and whether noncompliance is grounds for dismissal. Whereas Rule 5:6 (a) clearly calls for dismissal for failing to file a notice of appeal within the time and manner prescribed. Furthermore Rule 5:7 goes even further to indicate that the time prescribed by Rule 5:6(a) is mandatory. Yet Rule 5:9(b) makes no such declarations with respect to the

notice of filing of a transcript. In fact Rule 5:9(a) indicates that the notice of filing a transcript is waived and the transcript becomes part of the record by order of the judge, whether or not the transcript has been prepared at the time of the order. This rule "may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 92 S.Ct. 2294 (1972). In Winters v. N.Y., 68 S.Ct. 665 (1948) the Court held that a statute is unconstitutionally vague when it leaves a person uncertain as to the kind of prohibited conduct. It also held that a statute is void for uncertainty when it embraces acts which are prohibited on the one hand yet acceptable on the other hand. In Mears v. Dexter, 86 Va. 828, 11 S.E. 538 (1890) the court held that although the Va. statute requires a certificate that notice was given, does not declare that if such

certificate is not given the transcript shall be void, or that the appellate court or judge shall not take cognizance of the case; and, if such had been the intention of the legislature, it would doubtless have been expressed in clear and unmistakable terms. In Buckley v. Valeo, 96 S.Ct 612 (1976) the Court held that where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute if that can be done consistent with the legislature's purpose to avoid the shoals of vagueness. The Court also held that where First Amendment rights are involved, an even "greater degree of specificity" is required. In the instant case the legislature's intention is not clear and unmistakable with respect to the notice requirement contained in Rule 5:9(b), in that it doesn't declare that compliance is mandatory and that noncom-

pliance with the Rule is grounds for dismissal of petition for appeal. In Wayte v. U.S., 105 S.Ct. 1524 (1985) the Court held that although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis. The First Amendment proscribes legislative attempts at restricting the right to petition the Government for a redress of grievances. Clean-Up '84 v. Heinrich, 582 F.Supp. 125 (1984). In U.S. v. Jeter, 775 F.2d 670 (1985) the court held that whenever an overbroad law covering first amendment activities and formless standards of first amendment privileges are conjoined, the result is an operative, injurious legal reality suffering due process vagueness. Citing Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844,871 (1970). In the instant case Va. Supreme Court

Rule 5:9(a) on the one hand indicates that the transcript becomes a part of the record by order of the judge, whether or not the transcript has been prepared at the time of the order. Yet on the other hand Rule 5:9(b) requires a notice of filing a transcript identifying and reciting its delivery to the clerk, in order to become a part of the record. Rule 5:9(a) allows the transcript to become a part of the record without a notice and in fact the transcript doesn't even have to be prepared at the time of the judge's order. Whereas Rule 5:9(b) requires that a notice and the transcript be prepared and filed in order to be made a part of the record. These two widely opposing procedures for making the transcript a part of the record when coupled with the fact that the Rule fails to declare that compliance is mandatory and that noncompliance with the Rule is

grounds for dismissal, make this a statute drafted in "terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application." Connally v. General Construction Co., 46 S.Ct. 126 (1929).

Does Va. State Supreme Court Rule 5:9 (b), as applied, and/or on its face violate appellant's Fourteenth Amendment right to due process of law?

The Doctrine of Due Process of Law was intended to secure the individual from the arbitrary exercise of the powers of government. The touchstone of due process is protection of the individual against arbitrary action of government. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Daniels v. Williams, 106 S.Ct. 662 (1986). In the instant case the Va. State

Supreme Court abused its power in the application of Rule 5:9(b). In that they arbitrarily chose to summarily dismiss appellant's petition for appeal. Yet in the underlying case they allowed the appellees to have their petition for appeal reviewed on its merits despite the fact that they failed to file a notice of filing a transcript in violation of Rule 5:9. In addition in Sullivan v. Little Hunting Park, Inc., 90 S.Ct. 400 (1969) the Court clearly observed that the notice requirement was applied so inconsistently by the Va. Supreme Courts as to render the Rule more properly discretionary than jurisdictional. Clearly the court in the instant case has abused its discretion and power in an arbitrary manner by summarily dismissing appellant's petition for appeal, thereby violating appellant's constitutional rights to due process of law, as guaranteed by the Fourteenth Amendment.

In Hormel v. Helvering, 61 S.Ct. 719 (1941) the Court held that issues not raised in the court below would not be considered unless the obvious result would be a plain miscarriage of justice. In the instant case the appellant challenges the constitutionality of Va. Supreme Court Rule 5:9(b) in that it violates his Fourteenth Amendment due process rights. Although this challenge was not raised in the court below, appellant claims that a plain miscarriage of justice would result unless this Court considers this issue. Rule 5:9(b) suffers from Fourteenth Amendment due process vagueness, in that its prohibitions are not clearly defined. The Rule fails to warn or give a person of ordinary intelligence the opportunity to know what is prohibited so that he may act accordingly. There are no explicit standards for those who apply the Rule. The Rule is

impermissibly vague in that it delegates basic policy matters to judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The Rule infringes upon sensitive areas of basic First Amendment freedoms and operates to inhibit the exercise of those freedoms. Grayned v. City of Rockford, 92 S.Ct. 2294 (1972). In Country Club Tower Corp. v. Tower Management Corp., 275 F.Supp. 468 (1967) the court held that if state court in application of local law deprives person of some right without a hearing, action of state court may be set aside because it is wanting in due process and, in such case, wrong is righted by Supreme Court of the U.S. sitting in its appellate capacity. In the instant case the Va. Supreme Court deprived the appellant of his First Amendment right to petition the court,

and did so without a hearing in violation of his Fourteenth Amendment due process rights. (App. A, infra, 46). That is the Va. Supreme Court failed to review appellant's petition for appeal on its merits.

Does Va. State Supreme Court Rule 5:9 (b), as applied, and/or on its face violate appellant pro se's Fourteenth Amendment right to equal protection of the law?

In Wayte v. U.S., 105 S.Ct. 1524 (1985) the Court held that judicial decisions may not be based on arbitrary classification, including exercise of protected statutory and constitutional rights. Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judge-made as in statutory law. Connelly v. Western Union Tel. Co., 100 Va. 67, 40 S. E. 618 (1902); Yick Wo v. Hopkins, 6 S.

Ct. 1064 (1886). In the instant case the court arbitrarily, discriminatorily and summarily dismissed appellant pro se's petition for appeal as claimed in his petition for rehearing. (App. C, infra). That is in the instant case the appellees in the underlying case violated Rule 5:9 with respect to the notice requirement, yet the court chose to review their case on its merits, whereas in a similar if not identical circumstance it chose to summarily dismiss appellant's petition for appeal. The appellant claims that the court violated appellant's Fourteenth Amendment constitutional right to equal protection under the law due to his pro se status. The court's denial of equal justice is at least as vicious as that found in statutory law.

In Graham v. U.S., 528 F.Supp 933, (E.D.Pa.1981), the court held that a motion to dismiss a pro se complaint may

not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Citing Haines v. Kerner, 92 S.Ct. 594 (1972), (quoting Conley v. Gibson, 78 S.Ct. 99, (1957)).

In Frazier v. Collins, 538 F.Supp. 603, (E.D.Va.1982), the court held that it has a duty to assist a pro se litigant who may not understand the Rules of Civil Procedure.

In Hudspeth v. Figgins, 584 F.2d 1345, (4th Cir.1978), the court held that a pro se complaint must be read liberally, and such persons are not held to the strict pleading requirements otherwise required of attorneys. Thus the power summarily to dismiss a pro se complaint is limited.

In Vinnedge v Gibbs, 550 F.2d 926, (4th Cir.1977), the court held that pro se complaints, however unskillfully pleaded, are to be liberally construed.

In the instant case this Court arbitrarily and in an abuse of its discretion and power chose to hold the pro se appellants petition to a higher standard of pleading than that of the counsel represented appellees' petition in the underlying case, by dismissing his petition for appeal without adjudicating it on its merits. By so doing this Court has violated the doctrine of liberal construction of complaints by pro se litigants. Arbitrary and discriminatory actions are the natural by products of unconstitutionally vague statutes.

The threshold question presented is whether this Court should summarily reverse the decision below and remand the case to the Va. State Supreme Court with directions to develop a factual record adequate to serve as the basis for constitutional adjudication. In Hathorn v. Lovorn, 102 S.Ct. 2421 (1982) the Court

held that the court below is in a better position than this Court to fashion relief, because the court below "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence. In Staton v. Mayes, 552 F. 2d 908 (1977) the court held that for Fourteenth Amendment purposes of due process, there need be no full opinion or even formal findings of fact and conclusions of law by decision maker, but the reasons for the determination and the evidentiary basis relied on should be stated. Citing Goldberg v. Kelly, 90 S.Ct. 1011. In the instant case the Va. State Supreme court failed to provide the reasons for the determination and the evidentiary basis relied on to summarily dismiss appellant's petition for appeal. See App. A, infra 3. In Youakim v. Miller, 96 S. Ct. 1399 (1976) the Court held that conflicts between state and federal issues

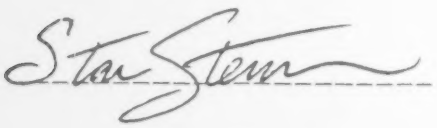
raised for the first time in this Court should be decided in the court below by vacating the judgment and remanding the case to the court below in order to allow the court below which is charged with the enforcement of the statute to also decide the statutory issues. In the instant case the appellant has raised issues for the first time in this Court concerning federal and state questions and prays that this Court will reverse and remand.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below and remand the case to the Va. State Supreme Court with directions to develop a factual record. In the alternative, the Court should note probable jurisdiction of this appeal and set it down for plenary briefing and argument. In the event that appellate jurisdiction under 28 U.S. C. sec. 2106, and 1257(2) were found

lacking, the papers be acted upon as a petition for certiorari pursuant to 28 U.S.C. sec. 2103. See Kulko v. Superior Court of California, Etc., 98 S.Ct. 1690 (1978). Furthermore, this Court should note probable jurisdiction of this appeal pursuant the appellant's First Amendment right to petition this Court for the redress of his grievances. In addition this Court should, in the light of appellant's pro se status, read and construe liberally appellant's appeal and not hold it to the same strict pleading requirements otherwise required of attorneys.

Respectfully submitted,



STANLEY STERNER
Pro Se Appellant

2544 Wilson Blvd.
Apt. No. 104
Winchester Va. 22601
(703) 667-6246

APPENDIX A

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 28th day of March, 1986.

Stanley Sterner, Appellant,

against Record No. 850660
Circuit Court No. L84-L-58

David J. Andre, et al., Appellees.

ORDER STAYING
EXECUTION OF
JUDGMENT

Upon consideration of the motion of Stanley Sterner, in proper person, it is now ordered that the execution and enforcement of the orders of this Court in the above style case entered on February 13, 1986 znd March 7, 1986 be, and the same are hereby, stayed, to and including the 5th day of June, 1986, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that Court.

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of March, 1986.

Stanley Sterner, Appellant,

against Record No. 850660
Circuit Court No. L84-L-58

David J. Andre, et al., Appellees.

Upon a Petition
for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of February, 1986 and grant a rehearing thereof, the prayer of the said petition is denied.

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of February, 1986.

Stanley Sterner, Appellant,

against Record No. 850660
Circuit Court No. L84-L-58

David J. Andre, et al., Appellees.

From the Circuit Court
of the City of
Winchester

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:9 (b) (now Rule 5:11).

APPENDIX B

Filed: June 2, 1986

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

STANLEY STERNER

Appellant

v. Record No. 850660
Circuit Court No. L84-L-58

DAVID J. ANDRE, ET AL

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Stanley Sterner, pro se, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, finding that the appeal was not perfected in the manner provided by

law, dismissing the appellant's petition for appeal filed in the above-styled case, Rule 5:9(b) (now Rule 5:11), entered on February 13, 1986 and March 7, 1986.

This appeal is taken pursuant to U.S.C. Const.Amend. 1, 28 U.S.C. sec. 2106, 28 U.S.C. sec. 1257(2) and/or 28 U.S.C. sec. 2103.

APPENDIX C

IN THE SUPREME OF VIRGINIA

AT RICHMOND

STANLEY STERNER

Appellant

v. RECORD NO. 850660

DAVID J. ANDRE, ET AL

Appellees

APPELLANT'S PETITION
FOR REHEARING

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA

Your Petitioner and Appellant, Stanley Sterner, respectfully submits this Petition for Rehearing, pursuant to Rule 5:20, of the Rules of the Supreme Court of Virginia.

The Appellant, pro se, asserts that he is aggrieved by the Order of this Court held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of February, 1986, dismissing the peti-

tion for appeal filed in the above-styled case, pursuant to Rule 5:9(b) (now Rule 5:11).

The Appellant, pro se, respectfully submits that there were errors in the rulings made by this Court in the denial of Appellant's Petition for Appeal. The Petition of the Appellant, pro se, should be granted.

ARGUMENT

I. BACKGROUND

On the 15th day of February, 1986, appellant, pro se, received the Order of this Court, dismissing his petition for appeal pursuant to Rule 5:9(b) now 5:11. On the 18th day of February, 1986, Appellant, pro se, called the clerk of this Court, Mr. David B. Beach, to clarify this Court's Order, due to failure of this Court to state with specificity or particularity the reason for dismissal of

pro se, appellant's, petition for appeal. Mr. Beach indicated that the petition was dismissed for failing to file or submit a notice of filing of transcript pursuant to Rule 5:9(b) now 5:11.

Appellant, pro se, will briefly state the principles of law, argument and authorities for granting his petition.

II. THIS COURT VIOLATED APPELLANT'S RIGHT TO EQUAL JUSTICE

The touchstone of due process is protection of the individual against the arbitrary action of government. The Due Process Clause was intended to secure an individual from an abuse of power by government officials. Daniels v Williams, Va., 106 S.Ct 662, (1986). The court also held that violation of this clause by a state official is prohibited by the Fourteenth Amendment.

In Curtis v. Rosso & Mastracco, Inc., 413 F.Supp 804 (E.D.Va.1976), the court held that the equal protection clause of

the 14th amendment is directed against the arbitrary enforcement or application of state law by public authority. The court also held that every person that uses any state law, rule, regulation, custom, or ordinance against any individual in violation of his constitutional or legal rights, shall be liable to that person for any damages, pursuant to 42 U.S.C. § 1983.

Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judge-made as in statutory law. Connelly v. Western Union Tel. Co., 100 Va. 67, 40 S.E. 618, (1902), Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct 1064, (1886). This Court discriminated against appellant and did so arbitrarily by allowing the Appellees in the underlying case to have their petition for appeal adjudicated on its merits despite the fact that they had al-

so failed to file a notice of filing a transcript. That is notwithstanding their promise to file a statement of facts, transcript and incidents of the trial, pursuant to Rule 5:9(c), they failed to file pursuant to Rule 5:9(c). See notice of appeal filed February 17, 1983. (Exhibit D). An examination of the following documents will show that the Appellees failed to file a notice of filing of transcript, statement of facts, and incidents of trial, pursuant to Rule 5:9(c). See Table of Contents (Exhibit B), Order of Trial Court entered March 4, 1983 (Exhibit C), Letter (Opinion) filed February 16, 1983 (Exhibit E), and Decree filed January 24, 1983 (Exhibit F).And an examination of this Court's Order will show that the Appellees' Petition was not dismissed pursuant to Rule 5:9. See Order dated December 21, 1983 (Exhibit A).

Clearly the circumstances between the

Appellees in the underlying case and the Appellant in the instant case is similar if not identical, i.e. the Appellees failed to file a notice of filing a transcript, and statement of facts pursuant to Rule 5:9, yet their petition was adjudicated on its merits, whereas the Appellant's petition was dismissed for failing to file a notice of filing a transcript pursuant to Rule 5:9. Apparently this Court acted arbitrarily against the Appellant due to his pro se status, while favoring the Appellees in their role as attorneys acting as advocates for their client.

This Court's action amounts to nothing less than an abuse of power in its arbitrary action against the Appellant in violation of his 14th amendment constitutional rights with respect to equal protection, equal justice, and his rights to due process of law.

III. THIS COURT ABUSED ITS DISCRETION WITH RESPECT TO THE NOTIFICATION REQUIREMENT

> ****But the court will not refuse to consider a transcript because of a mere formal violation of the rules which causes no inconvenience.********

4, Am., Jur., 2d., Appeal and Error, § 404, pp. 867.

The Appellees were not inconvenienced by the Appellants failure to comply with Rule 5:9 concerning the transcript notification requirement, i.e. they did not notify appellant via petition or motion to dismiss for failing to comply with Rule 5:9. Yet this Court apparently decided to arbitrarily dismiss the appellant's petition without any prompting from the appellees.

In Towler v. Com., 216 Va. 533, 221 S.E.2d 119, (1976), the court curiously adjudicated this case on its merits, despite the fact that the appellant failed to comply with Rule 5:9. In addition they

held that dismissal was disliked where the correctness of a ruling is apparent, and dismissal is especially unpalatable, where the correctness of a ruling by the trial court is less apparent, with respect to violation of Rule 5:9.

In Roe v Roe, -Va.-, 324 S.E.2d 691, (1985), the court refused to grant the appellee's motion to dismiss appellant's petition for failing to include transcript into record pursuant to Rule 5:9. Despite appellant's failure to include transcript into record pursuant to the mandatory provisions of Rule 5:9, the court nevertheless adjudicated appellant's petition on its merits.

In Orphanoudakis v. Orphanoudakis, 199 Va. 142, 98 S.E.2d 676, (1957), the court held that implied notice is generally regarded as a kind of actual notice which consists of knowledge of facts so informing that a reasonably cautious per-

son would be led by them to the ultimate fact. The appellants notice of appeal filed July 1, 1985, and transcript filed June 14, 1985, clearly satisfies the actual notice requirement as defined, supra, furthermore the attorneys representing the appellees are most assuredly on a higher level of knowledge and cautiousness then the above person described as reasonably cautious. The court also held that means of knowledge with the duty of using it is equivalent to knowledge itself.

IV. THIS COURT ABUSED ITS DISCRETION WITH RESPECT TO PRO SE PLEADINGS

In Graham v. U.S., 528 F.Supp 933, (E.D.Pa.1981), the court held that a motion to dismiss a pro se complaint may not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Citing Haines v.

Kerner, 92 S.Ct. 594 (1972), (quoting Conley v. Gibson, 78 S.Ct. 99, (1957)).

In Frazier v. Collins, 538 F.Supp. 603, (E.D.Va.1982), the court held that it has a duty to assist a pro se litigant who may not understand the Rules of Civil Procedure.

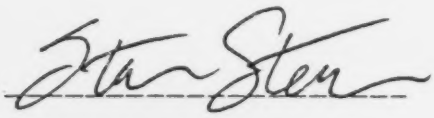
In Hudspeth v. Figgins, 584 F.2d 1345, (4th Cir.1978), the court held that a pro se complaint must be read liberally, and such persons are not held to the strict pleading requirements otherwise required of attorneys. Thus the power summarily to dismiss a pro se complaint is limited.

In Vinnedge v Gibbs, 550 F.2d 926, (4th Cir.1977), the court held that pro se complaints, however unskillfully pleaded, are to be liberally construed.

In the instant case this Court arbitrarily and in an abuse of its discretion and power chose to hold the pro se appel-

lants petition to a higher standard of pleading than that of the counsel represented appellees' petition in the underlying case, by dismissing his petition for appeal without adjudicating it on its merits. By so doing this Court has violated the doctrine of liberal construction of complaints by pro se litigants.

Respectfully submitted,



STANLEY STERNER
Pro Se Appellant

2544 Wilson Blvd.
Apt. No. 104
Winchester Va. 22601
(703) 667-6246

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1990

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STANLEY STERNER,

Appellant

v.

DAVID J. ANDRE, ET AL.,

Appellees.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

David P. Durbin
JORDAN COYNE SAVITS & LOPATA
1030 Fifteenth Street
Suite 500
Washington, D.C. 20005
(202) 371-1800

Counsel for Appellees

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MOTION OF APPELLEE TO DISMISS OR, IN THE ALTERNATIVE, AFFIRM

Pursuant to Rule 16.1, Appellees David J. Andre, et al., respectfully move this Honorable Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Virginia on the grounds that said Court has the authority to prescribe rules for the proper administration of justice and that it is manifest that this case does not present a substantial federal question.

STATEMENT OF FACTS

On July 19, 1984, Stanley Sterner, pro se appellant herein, filed a Motion for Judgment in the Circuit Court of the City of Winchester against several attorneys who had represented him in an

earlier action. Mr. Sterner alleged that the attorneys had fraudulently and negligently performed their duties. On June 3, 1985, several days after a full trial before a jury, a judgment order was entered dismissing Mr. Sterner's case with prejudice on the ground that he had not satisfied his burden of proof to show legal malpractice. Mr. Sterner filed a Motion to Reconsider which the Circuit Court considered and then denied.

Mr. Sterner then submitted a Notice of Appeal to the Supreme Court of Virginia on July 1, 1985. On February 13, 1986 the Supreme Court of Virginia dismissed Mr. Sterner's appeal, finding that the appeal was not perfected in the

manner provided by law. The Order cited Virginia Supreme Court Rule 5:9(b) (now Rule 5:11) which provides:

> Rule 5:9. Transcript or Written Statement.
> (Effective October 1, 1984)
>
> . . .
>
> (b) The transcript of any hearing also becomes a part of the record when, within sixty days after entry of the final judgment, the transcript is filed in the office of the clerk and a notice signed by counsel for the appellant is filed in the officer of the clerk identifying the transcript and reciting its delivery to the clerk. There shall be appended to the notice either a certificate of counsel for the appellant that a copy of the notice has been mailed to opposing counsel or an acceptance of service such notice by opposing counsel.
>
> . . .

Va. Code, Sup. Ct. R. 5:9(b) (1984).

Mr. Sterner then filed a Petition for

Rehearing on February 25, 1986, in which he alleged that the Supreme Court of Virginia acted arbitrarily in dismissing his appeal and violated his right to "equal justice." This petition was denied on March 7, 1986.

Finally, Mr. Sterner's dissatisfaction with the disposition of his case within the Virginia judiciary, has led him to petition this Court for relief. In essence, Mr. Sterner is requesting that this Court instruct the Virginia Supreme Court on how to interpret and apply its own rules.

ARGUMENT

1. The Supreme Court of Virginia Has Authority To Prescribe Such Rules Of Procedure Or Practice As May Be Necessary For The Proper Administration Of Justice.

The Supreme Court of Virginia has authority, under the United States Constitution, to promulgate and enforce rules of procedure and practice for administration of justice in the Commonwealth of Virginia. This power is derived from the Tenth Amendment which provides, in pertinent part, that,

> [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people.

U.S. Const. Amend. X. By providing for a division of powers between the States and the federal government, the framers of the Constitution reserved to the States, inter alia, the power to maintain state judicial systems for the determination of legal controversies. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281,285 (1970).

Acting within its power to maintain its own judicial system, the Commonwealth of Virginia has vested in its highest court, the Supreme Court, the power to prepare a system of rules for practice in all courts of the Commonwealth.[1/] Rule 5:9, the Virginia

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1/ § 8.01-3. Supreme Court may prescribe rules; effective date
(footnote continued)

Supreme Court Rule being challenged by Mr. Sterner, is such a rule. Rule 5:9 prescribes the procedures by which a transcript becomes part of the record on appeal. This rule is jurisdictional and

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(footnote continued from previous page)

thereof; rules to be printed and distributed; rules to be published, indexed, and annotated; effect of subsequent enactments of General Assembly. -- A. Supreme Court to prescribe rules. -- The Supreme Court, subject to... may, from time to time, prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process and may prepare rules of evidence to be used in all such courts. This

(footnote continued)

any failure to comply with it results in the dismissal of an appeal. Towler v. Commonwealth of Virginia, 216 Va. 533, 221 S.E.2d 119 (1976) (appellee's motion to dismiss writ of error granted because of appellant's failure to properly make transcript a part of the record).

It follows from the separation of powers doctrine and the inherent power of courts to prescribe rules of practice and procedure, that "the orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are

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(footnote continued from previous page)
section shall be liberally construed so as to eliminate unnecessary delays and expenses.

Va. Code § 8.01-3 (1984).

shown to exist." United States, Ex Rel. v. Tyler, 269 U.S. 13, 17 (1925). In at least one "exceptional circumstance" this Court has found it necessary to "interfere" with an earlier version of Rule 5:9 of the Supreme Court of Virginia. In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court granted a petition for certiorari to hear for a second time a case involving the alleged discrimination against a black family in the use of certain community facilities. The Supreme Court of Virginia had twice refused to hear this case on the ground that the appeals had not been perfected as required by Rule 5:1 (an earlier version of Rule 5:9), a procedural rule of the court. In Sullivan, this Court clearly

stated that the Virginia Court rule was not "a novel procedural requirement... ." 396 U.S. at 233. Moreover, it did hold that the Virginia court had not "so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented... ." Id. at 234.

Rule 5:9 as applied in this case does not bar any federal claim from being considered by either the Supreme Court of Virginia or this Court. Mr. Sterner originally brought an action for legal malpractice, based on Virginia law, in the Circuit Court of the City of Winchester, a trial court of general jurisdiction within the Commonwealth. Being dissatisfied with the decision of

the trial court, Mr. Sterner filed a petition in the Virginia Supreme Court. Mr. Sterner failed to comply with the requirements of Rule 5:9(b) and therefore, the court, pursuant to its authority, dismissed Mr. Sterner's petition for appeal. In this case there are no exceptional circumstances which require this Court to override the authority of the Virginia Supreme Court.

Rule 5:9, as are all the Virginia rules of procedure, is published in written form and available to the general public, including pro se petitioners such as Mr. Sterner. The Supreme Court of Virginia has clearly indicated the importance of Rule 5:9 in cases in which the transcript is

indispensable to disposition of the appeal. In Towler, supra, the Virginia Supreme Court stated,

> We take the occasion, however, to reiterate the jurisdictional nature of Rule 5:9 and to reemphasize the necessity of compliance with its mandatory requirements. We do this because we have observed far too many violations of this rule; and we lament the numerous instances in which we have been forced to dismiss appeals because of failure to observe the rule's requirements.

216 Va. ___, 221 S.E.2d at 121. In the instant case, Mr. Sterner failed to comply with the requirements of Rule 5:9, and the court, acting within its inherent power to prescribe and

apply rules necessary for the proper administration of justice, dismissed Mr. Sterner's petition for appeal.

In summary, the Virginia Supreme Court has authority to prescribe rules for the administration of justice. Clearly, the Court lawfully exercised this authority when it promulgated Rule 5:9 and when it dismissed Mr. Sterner's petition for failure to comply this Rule.

2. There Is No Substantial Federal Question To Be Decided In This Case.

Notwithstanding the proposition asserted above that state courts have authority to administer justice, this Court has on occasion reviewed challenges to state court rules, as demonstrated in Sullivan v. Little

Hunting Park, supra, when such challenges involved issues of substantial federal question. It is clear that there is no substantial federal question here.

This Court has jurisdiction to review state court decisions that involve state court rules which are unconstitutional. In In re Griffiths, 413 U.S. 717 (1973), a Dutch citizen residing in Connecticut was denied permission to take the Connecticut bar examination because of a citizenship requirement imposed by a state court rule. The state courts upheld the rule against the applicant's constitutional challenge. This Court noted probable jurisdiction and held that the rule unconstitutionally discriminated against

resident aliens. In its opinion, the Court stated that "a State has a constitutionally permissible and substantial interest" in the qualifications of those admitted to practice law. 413 U.S. at 722. However, the Court found that, pursuant to the Connecticut court rule, the sole basis for the applicant's disqualification was her status as a resident alien and therefore, the rule violated the Equal Protection Clause of the Fourteenth Amendment.

Although a state court rule on its face is not unconstitutional, this Court will nonetheless review a state court order which attempts to bar a serious federal constitutional claim based on a court rule. In NAACP v. Alabama, 377

U.S. 288 (1964), the National Association for the Advancement of Colored People was restrained by an Alabama trial court from conducting any business in Alabama. The Association appealed to the Supreme Court of Alabama. The Alabama court affirmed the lower court's decision, relying on a procedural rule mandating the dismissal of all writs of error if one writ of error failed. This Court held that the Alabama court's application of its procedural rule was not "adequate to bar its review of the Association's serious constitutional claim." 377 U.S. at 296.

Contrary to Mr. Sterner's arguments, this case does not present any substantial federal questions comparable to those raised in NAACP v.

Alabama or In re Griffiths, or in other related decisions of this Court. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978); and Hathorn v. Lovorn, 457 U.S. 255 (1982). There is no support in any of the authority appellant cites for the proposition that Rule 5:9 on its face is unconstitutional or that the application of Rule 5:9 to Mr. Sterner's petition was an attempt by the Virginia Supreme Court to bar decision of a substantial federal question.

The alleged federal question which Mr. Sterner suggests is presented in this case is whether the application of Rule 5:9 by the Virginia Supreme Court violates his constitutional rights as a pro se litigant. There is no authority

for the proposition that pro se litigants constitute a suspect classification entitled to special treatment under the Equal Protection Clause of the Fourteenth Amendment. Mr. Sterner does cite several cases which explicitly support the proposition that pro se complaints, however unskillfully pleaded, are to be liberally construed. See Vinnedge v. Gibbs,k 550 F.2d 926, 928 (4th Cir. 1977); Hudspeth v. Figgins, 584 F.2d 1345, 1347 (4th Cir. 1978); and Frazier v. Collins, 538 F.Supp. 603, 605 (E.D.Va. 1982).2/ However, these cases

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2/ The pro se litigants in Vinnedge, Hudspeth, and Frazier, supra, were all prisoners of the state at the time they filed their complaints. Here, Mr. Sterner is asserting a common law tort claim against his former counsel who represented him in a case matter.

do not indicate that pro se litigants are afforded liberal compliance with court procedural rules. The Virginia Supreme Court has the authority to promulgate procedural rules for the proper administration of justice and to apply this rule strictly to all petitioners to the state court.

CONCLUSION

Wherefore, appellee respectfully submits that the Supreme Court of Virginia was acting properly within the scope of its authority when it promulgated and applied Rule 5:9, and that there is no substantial federal question to be decided in this case. Appellee respectfully moves the Court to

dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,
JORDAN COYNE SAVITS & LOPATA

By _____
David P. Durbin
JORDAN COYNE SAVITS & LOPATA

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, first class and postage prepaid, this 7th day of July, 1986, to:

Stanley Sterner
2544 Wilson Boulevard
Apartment Number 104
Winchester, Virginia 22601

_____
David P. Durbin